UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 4

In the Matter of:

VIRGO MEDICAL SERVICES INC.
Employer

Case No. 04-RC-104485

and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Petitioner

POST-HEARING BRIEF OF PETITIONER

I. Procedural Background

Pursuant to a Decision and Direction of Election dated June 20, 2013[1], a secret ballot election was conducted by mail on July 16 in the following unit[2] of employees:

Included: All full-time, regular part-time, and per-diem (working 20 hours or more per week) Drivers, Dispatchers, and On-Site Coordinators employed by the Employer at its Philadelphia, Pennsylvania facility.

Excluded: All other employees, Operations Managers, guards, and supervisors as defined in the Act.

The ballots were tallied on July 31[3] at Region 4 count was held The Tally of Ballots, copies of which were made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters 27
Void Ballots 3
Votes cast for Petitioner 7
Votes cast against participating labor organization 5
Challenged Ballots 8

[1] All dates herein are 2013 unless otherwise noted.
[2] In footnote 16 of the Decision and Direction of Election, drivers Baron DeShong and Mark Wright were permitted to vote subject to challenge.
[3] The ballots were initially counted, and a Tally of Ballots issued on July 31, 2013. That tally of ballots was revoked by the Acting Regional Director on August 19, 2013 because a Request for Review was still pending on July 31, 2013. The Request for review was denied on October 21, 2014. The ballot count was subsequently held and the Tally of ballot issued on November 6, 2014.

Valid votes counted plus challenged ballots.....20

The challenged ballots were determinative of the results of the election. On November 12, 2014, the Employer timely filed Objections to the conduct affecting the outcome of the election.[4] Pursuant to Section 102.69 of the Board's Rules and Regulations Regional Director issued an Order that a hearing be held before a Hearing Officer for the purpose of taking testimony to resolve the substantial and material factual issues raised by the Challenged Ballots[5] and Objections.

On December 23, 2014, the parties entered into a Stipulation concerning the eight challenged ballots. As a result of that Stipulation, on January 8, 2015, the Region issued a Corrected and Revised Tally of Ballots was issued that showed the following result.

Approximate number of eligible voters 27
Void Ballots 3
Votes cast for Petitioner 13
Votes cast against participating labor organization 6
Challenged Ballots 0
Valid votes counted plus challenged ballots.....20
Number of sustained challenges (voted ineligible)..... . 1

A majority of the valid ballots cast plus challenged ballots have been cast for the Petitioner.

A Hearing was conducted before Administrative Law Raymond P. Green at the offices of the NLRB Region Four on January 15, 2014.

The Employer's Objections.

The Objections in this matter take two forms. The first is misconduct by the Petitioner. The second is to the mechanics of the Election. The Regional Director on July 3 notified the parties that the election would be conducted by mail ballot.

[4] On December 5, 2014, the Employer withdrew Objections 6 and 12. On January 15, 2014, the Employer withdrew objections 7 and 8.

[5] On December 23, 2014, the Parties entered a stipulation resolving the issue for all of the challenged ballots.

II. Objections

A. Union Misconduct

1. The Union and its agents, during July, 2013, interfered with employee free choice, thus affecting the results of the election, by informing employees that if they voted "yes" they would not need to pay a union initiation fee.

2. The Union and its agents, during July, 2013, interfered with employee free choice, thus affecting the results of the election, by informing employees that the only purpose of the vote was that if the employee voted "yes" the employee would not have to pay a union initiation fee.

3. The Union and its agents, during July, 2013, interfered with employee free choice, thus affecting the results of the election, by informing employees that they must vote "yes."

4. The Union and its agents, during July, 2013, interfered with employee free choice, thus affecting the results of the election, by informing employees that they were already members of the Union.

5. The Union and its agents, during July, 2013, interfered with employee free choice, thus affecting the results of the election, by threatening employees if they did not vote for the Union by telling patients that certain employees did not support the union for the purpose of discouraging those patients from riding with those drivers, thus threatening those employees' positions.

III. Employer Objections to the Mail Ballot Election

9. Employees within the bargaining unit were unable to cast votes because after receiving an unsigned envelope, the NLRB staff did not send employees a duplicate kit with a letter explaining that their failure to sign voids a returned ballot, thus affecting the results of the election.

10. The NLRB's decision to use the mail ballot election was unreasonable, arbitrary, and capricious and interfered with employee free choice, thus affecting the results of the election.

11. The operation of the mail ballot was confusing at best and undermined a free and fair election, thus affecting the results of the election.

A. The Mail Ballot Election

At the hearing, the General Counsel attended the hearing for the purpose of introducing evidence to support the Regional Director's decision to conduct a mail ballot election.

The Region through Kathleen O'Neill, Senior Field Examiner, after the issuance of the Decision and Direction of Election immediately began a dialogue with Gary Lieber, counsel for the Employer E-1[6]. On June 24, Ms. O'Neill sent Mr. Lieber an email attempting to set up the Election. On June 26, Ms. O'Neill expressed her frustration because she had not heard any specifics to her original request about drivers not being present at the Employer's 2038 East Haines Street, Philadelphia PA address. Ms. O'Neill also had driver manifests that were introduced in the Representation case along with the transcript B-2.[7] In the same email, she informed Mr. Lieber that she was prepared to recommend a mail ballot election. On June 27, Mr. Lieber's only response to Ms. O'Neill was that he was trying to work it with the company, but he was not in his office E-1. On June 28, Ms. O'Neill informed Mr. Lieber she was leaving the office at 2:00 pm and that if she did not hear from Mr. Lieber she would recommend a mail ballot election. On June 28, Mr. Lieber's only response at 11:57 am was, "We suggest the election at 12:00-2 and 2:30-4." E-1

On July 1, Ms. O'Neill sent an email (J-2) to counsel of both the Employer and the Petitioner. In this email, she informed the parties that the Regional Director decided to have a mail ballot election because of the staggered shifts, different schedules of each day, traffic and other variables involved with the transporting patients to scheduled medical appointments. On July 3, the Regional Director sent a letter to Robert Freiling, a representative for the Petitioner and Rodney Arrington confirming the details of the mail ballot election J-3. On the same day, the Regional Director sent Notice of the Election to Mr. Arrington J-4. Copies were mailed to all the parties including counsel for the Employer and Petitioner as well as all of the eligible voters listed on the Excelsior list J-1. This Notice also included the NLRB's Instructions to Eligible Employees voting by Mail United Sates Mail.

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[6] NT refers to the page number of the Notes of Testimony of the Hearing. B-refers to Board Exhibits followed by the number. P refers to Petitioner Exhibits followed by the number. E-refers to Employer exhibits followed by the number.

[7] Board Exhibit 2 (transcript and Exhibits) Specifically the pages Testimony of Glen Bielic, Director of Operations of Philadelphia and East Orange
p. 21, line 13 top. 24, line 19
p. 41, lines 12 to 17
p.129, line 1 to p.132, line 13
p.141, line 6 to 144, line 2
Testimony of Tony Agosto, Chief Operating Officer
p. 200, line 20 to p. 201, line 16
Testimony of Rodney Arrington, Philadelphia Operations Manager
p. 234, lines 12 to 19
and Employer's Exhibit 4(a)-4(d).

As noted, herein there were three void ballots. There were received from Carmen Jones, Mark Wright, and Clevell Stockton. All three were either received through the mail or in the case of Stockton; he personally delivered his ballot to the Regional Offices. All were marked void by the Region since the envelope in which the ballots were returned were not signed Bd. Exhibits 4, 5 and 6. . The instructions for the eligible employees J-6 5 explicitly instructed the individual voter to sign the back of the yellow envelope. These three ballots were not properly counted per 11336.5 (c) of the Case Handling Manual for Representation Cases. The Employer at the hearing mentioned it was not questioning the Region, not counting the void ballots but would use these examples to show how a mail ballot election can be confusing.

B. Employer Did Not Properly Raise its Objection to Regional Director's direction of a Mail Ballot

It is the position of the Petitioner that the Employer has waived its right to challenge the Regional Director' decision to conduct a mail ballot election NT-30. The Employer failed properly to raise the issue either by filing a Special Permission to appeal the Regional Director's direction of a mail ballot to the Board or by raising the matter in its Request for Review that it filed with the Board on July 9. Petitioner submits that the Employer's failure to raise properly this issue procedurally it cannot now object at date so far removed from the decision of the Regional Director's decision to conduct a mail ballot election.

On July 1, the Regional trough Ms. O'Neill notified the parties that the Regional Director decided to conduct a mail ballot election. The Employer did not once raise any objection to the decision for a mail ballot election until it filed is objections to the conduct of the election. Further, it undisputed that the Employer did not file a Special Request for Appeal with the Board nor did it raise the matter in its Request for Review that it filed on July 9 B-1(n)[8]. The Employer sat on its rights in this case and cannot be allowed to raise this issue now.

It is the position of the Petitioner any objection to the method of how the election would be conducted is an issue that must be raised as soon as possible by the objecting party. In two recent unpublished decisions, the Board granted Employer Special Requests to Appeal the Regional Director's direction of a mail ballot election. Allied Waste Services of North America, LLC, Case 20-RC-133841 (September 23, 2014), Covanta Honolulu Resource Recovery

[8] Per the informal index of the Exhibits created by Employer's counsel

Venture, 20-RC-140392 (January 20, 2015). In both cases, the matter of the decision to conduct a mail election was immediately appealed to the Board[9].

In this case, the Employer remained conspicuously silent as to the Regional Director Walsh's decision to conduct a mail ballot election. As such, the Employer's objection to the conduct of the mail ballot election should be dismissed as untimely and barred based on the doctrine of laches.

Laches consists of two elements: (1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party." Brown-Graves Co. v. Central States, Southeast & Southwest Areas Pension Fund, 206 F.3d 680, 684 (6th Cir.2000). Petitioner asserts that laches should bar the Employer's objection to the decision to have a mail ballot election.

In the alternative, if this procedural defect is overruled, Petitioner would assert on the merits that the Regional Director's decision to conduct a mail ballot election in this particular case was warranted. Further, his decision was not "unreasonable and arbitrary and capricious and interfered with employee free choice, thus affecting the results of the election," as claimed by the Employer's objection.

C. A Snapshot of the daily operations as of Virgo in June-July 2013-Testimony at the instant hearing

At the instant hearing, the Employer presented two witnesses to testify why there should have been a manual ballot election. The first witness is Gary Lieber, counsel for the Employer. Mr. Lieber testified that after he discussed the matter with the Employer[10] he suggested the times of 12:00 pm to 2:00 pm and 2:30pm to 4:00 pm. The Region had already mentioned the date for the election to be either July 15 or July 16.

Rodney Arrington, the Philadelphia Operations Manager, testified about the schedules of the drivers located at the Philadelphia facility. Arrington testified that he recommended the above times to Mr. Lieber NT-130. Examining Mr. Arrington's testimony concerning the voting time for a manual election even with his testimony in this hearing presents significant obstacles to having a manual ballot election. First, there are four drivers, who do not even start or end their day at the Philadelphia facility NT.127. These drivers start their day at the Employer's East Orange facility that is some 90 miles from the Philadelphia Facility. Marlyn

[9] September 17, 2014 for Allied and December 17, 2014 for Covanta

[10] It appears the Employer's representative is Rodney Arrington

Williams, who is classified as the on-site coordinator, reports to and works at the Philadelphia Veteran's Hospital every day. She is located about 12 miles from the Employers Philadelphia facility.

A. Testimony at from the R-Case hearing of May 22, 2013

In that, case Glen Bielic, B-2[11] the Employer's Director of Operations testified he was responsible for directing the transportation flow for both the Philadelphia and East Orange facilities. He is Rodney Arrington's supervisor.. Mr. Bielic testified in great detail about the schedules of the drivers at the Philadelphia facility. He was asked the following question, by the Hearing Officer, Ms. O'Neill:

HEARING OFFICER O'NEILL: I see. Okay. And there are no set shifts, for example --
THE WITNESS: There are no set shifts for either facility.
HEARING OFFICER O'NEILL: For either facility?
THE WITNESS: So it would be on a -- based strictly on the workload. Every day there's a start time for a particular employee. **One day it could be 4:00 O'clock in the morning. The next day it could be 1:00 O'clock in the afternoon.**
HEARING OFFICER O'NEILL: Okay.
THE WITNESS: One day it could be 12:00 noon. The next day it could be 9:00 O'clock. It varies on a day to day, based on the workload. NT-130-131 Bd-2.

The following. represents testimony about the "typical day" again with Mr. Bielic:

HEARING OFFICER O'NEILL: Yeah. Are there typical schedules that the drivers in Philadelphia and then again the 16 drivers in East Orange keep? For example, there's usually a morning shift starting at 7:00, which could vary by an hour or so? Are there typical schedules?
THE WITNESS: No, there are not. **There are no typical schedules**, no. Again, it varies on a day to day basis. Bd-2 NT 131.

Thus, the testimony of Mr. Bielic on May 22, 2103 stands in direct contrast to the testimony in the instant case offered by Messrs. Lieber and Arrington.

Petitioner submits that given this contradictory testimony and other information from the Employer, the Regional Director made the correct decision to conduct a mail ballot election.

In San Diego Gas and Electric, 325 NLRB 1143 (1998) the Board decided a case that in effect lead to the updating the Case Handling Manual the majority abandoned the standard set

[11] See footnote 7.

forth in the Board's Case Handling Manual that the use of mail balloting, should be limited to those circumstances that clearly indicate the infeasibility of a manual election. Noting that the Manual has not been revised since 1989 and did not reflect Board decisions issued since that date, the majority stated that this has resulted in some confusion as to when it is appropriate to use mail ballots. Members Fox and Liebman set forth the following guidelines clarifying the circumstances under which it is within the Regional Director's discretion to direct the use of mail ballots: (1) where eligible voters are scattered because of their job duties over a wide geographic area; (2) where eligible voters are scattered because of their work schedules; and (3) where there is a strike, a lockout, or picketing in progress. See also 11301.2 Manual or Mail Ballot Election: Determination, Case Handling Manual Part 2 Representation Cases.

B. Some of the Eligible Voters are Scattered Geographically.

In the instant case, there were at least 4-5 voters who were dispatched daily from the Employer's East Orange facility and did work primarily in the Philadelphia area. These four employees represented 15% of the employees eligible to vote. The employees were Baron DeShong, Mark Wright, and Maurice Hunt and Gary Washington B-2,NT-24. These drivers travel over 90 miles one way to 2038 East Hanes Street location in Philadelphia[12]. According to Goggle Maps, the time to travel this distance is over 1 hour and 30 minutes. Contrary to the testimony of Marlyn Williams the on-site coordinator for the Employer located at the Veteran's Hospital in Philadelphia that is almost 12 miles one way and with traffic can take up to ½ hour of travel time.

In M&N Mail Service, 326 NLRB 451 (1998), the Regional Director ordered a mail ballot election because 15 percent of employees would be unable to vote. Additionally, the Board has found that forcing even a portion of voters to travel to vote warrants a mail ballot. See Odebrecht Contractors, 326 NLRB 233, 233 (1998) (finding voters "sufficiently 'scattered" . . . to warrant an election by mail ballot").

C. The Employees are Scattered in Terms of Varied Work Schedules.

The Employees' schedules are also severely scattered, a fact that is not contested by the Employer at the hearing. See generally Reynolds Wheels Int'l, 323 NLRB 1962, 1962 (1997) (affirming the Regional Director's decision to order a mail ballot election where,

[12] Take administrative notice of distances see Federal Rule of Evidence 201.

"although the eligible voters [were] not scattered geographically. . . they [were] scattered in terms of working staggered shifts").

The Employer has no set starting time or quitting time. Drivers are notified the night before around 6:00 what their job assignments will be for the next day. A review of the driver manifests introduced, in that case, to decide the scope of the unit, shows that on May1 Er-4(a) there were approximately 20 drivers. The drivers for had the following starting times:
4:30 am One Driver

5:00 am Two Drivers

5:15 am One driver

5:30 am Two Drivers

6:00 am Five Drivers

6:15 am One Driver

7:00 am Two Drivers

7:30 am Two Drivers

8:00 am One Driver

12:30 pm Two Drivers

4:30 pm One Driver

The twenty drivers had 11 different starting times.[13]The last driver Harry Wakefield did not even report to work within the hours suggested by the Employer for an election. He had a 7:15 pm pick up time had had a pickup in Moorestown NJ which is 17 miles from the Employer's facility with a travel time of 45 minutes with a delivery to Lumberton NJ that is 9 miles from Moorestown with a travel time of 18 minutes. The return trip to the Hanes Street Facility would be for 56 miles or about one hour of drive time.

These manifests were taken into consideration when the Regional Director made a determination for a mail ballot. His decision was not a decision that was unreasonable,

[13] It is unclear from this manifest what the starting times were for the four drivers from East Orange, Baron DeShong, Mark Wright, Maurice Hunt, Gary Washington, and Amit Lalchan (the fifth driver from East Orange, NJ. NT. 127

arbitrary and capricious that interfered with employee free choice. Counting only the five East Orange employees in this election, they amounted to 15% of the eligible voters who would not have been able to vote in the election. In M&N Mail Service, supra., the Regional Director ordered a mail ballot election because 15 percent of employees would be unable to vote in a manual ballot election.

The eligible voters are definitely scattered, Employees may be deemed to be "scattered" where they work in different geographic areas(as they do in this case) , as well as when they work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules. See also 11301.2 Manual or Mail Ballot Election: Determination. Given the significant degree of scattering of shift change times on any given day and the geographic scattering it was is not possible to identify definite voting periods that could accommodate the situation in the instant case. .

D. Changing Employee Work Schedules to be able to Vote.

In this case, it is apparent that to accommodate a manual ballot election given many different starting and ending times for a majority of the eligible employees along with the five eligible employees from East Orange, the Employer would have had to alter the employees work schedules on the proposed day of the election. While the changing of employees' schedules is not improper, Board Member Gould in GPS Terminal Services, Inc., 326 NLRB 839 (1998) noted ". . .the message sent to employees is that their ability to vote is predicated on a different work schedule over which they have no control. The unilateral change of any aspect of the work relationship that is within the employer's absolute control cannot be a prerequisite to employee access to the Board's electoral process. In my view, employee free choice is not best realized under such circumstances."

In London's Farm Dairy, Inc., 323 NLRB 1057 (1997), at 1057, , the Board held that changing the work schedules for the eligible voters in order to capture NT-35, the employees so they can vote in a manual ballot election, while not improper can inconvenience certain employees by "the need to impose work schedule changes on a significant number of employees, who may well have family responsibilities or other plans for what would normally be their off-work time and might resent the change as something effectively forced on them by those who initiated and supported the organizing campaign."

IV. The Broad Discretion that the Board has invested in the Regional Director

The nature of a Regional Director's discretion to decide whether to conduct mail or in-person balloting has been reviewed by the Third Circuit Court of Appeals, which has jurisdiction over the geographic area encompassed by Region 4, where this case originates. In N.L.R.B. v. Cedar Tree Press, Inc., 169 F.3d 794(3rd Cir. 1999), the Court held that Regional Director have been vested with discretion to make the decision to conduct a mail ballot election. The NLRB has wide discretion in the administration of representation elections. See Kwik Care Ltd. v. NLRB, 317 U.S. App. D.C. 318, 82 F.3d 1122, 1126 (D.C. Cir. 1996). The NLRB has delegated a portion of its authority to the Regional Directors who have the discretion to determine election arrangements, including whether the election should be conducted manually or by mail ballot. San Diego Gas & Elec., supra. In Kwik Care Ltd., the Court held that the Regional Director's decision in this regard will not be subject to review, and noted that the Board in San Diego Gas expressly stated that it was "clarifying the circumstances under which it is within the Regional Director's discretion to direct the use of mail ballots." Id. at 1145. San Diego Gas, does not hold that mail ballot elections must be held in all cases in which they may be appropriate, but rather reaffirms the broad discretion enjoyed by the Regional Directors in determining which type of election is appropriate.

In Nouveau Elevator Industries, Inc., 326 NLRB 470, at 471 (1998) the Board denied the Petitioner's Special Request for Leave to Appeal from Regional Director's Decision to Refuse to Conduct Mail Ballot Election.[14] The Board held, "under the circumstances of this case, and given the broad discretion that the Board has invested in the Regional Director, we find that the Regional Director did not abuse his discretion by ordering a manual election." In fact, the cases cited below supporting the Board's decision here that the broad discretion delegated to Regional Directors to finalize the details surrounding representation proceedings. See Coast North America (Trucking) LTD, 325 NLRB 980, 981 & n.5 (1998) (upholding the Regional Director's direction of a manual ballot despite a Board majority agreeing that the case would have been appropriate for mail balloting); Sutter West Bay Hosp., 357 NLRB No. 21, 2011 WL 3269356, at *3 (2011) (upholding the Regional Director's direction of a mail

[14] Petitioner notes that in all of the case questioning the method of the ballot, the issue was raised before the Board on Request for Review or Special Request for Leave to Appeal from Regional Director's Decision to Refuse to Conduct Mail Ballot Election. The Employer in this case did not raise the issue until it filed objections to the election.

ballot) and Reynolds Wheels Int'l, 323 NLRB at 1062 (upholding the Regional Director's direction of a mail-ballot election).

In the end, the Regional Director's decision to hold a manual election was validated by the turnout, 23 of 26[15] eligible employees voted, or 88%. The Employer, in this case, has not shown that the Regional Director abused his discretion and the decision to have a mail ballot election was proper..

V. Objections Directed towards the Union-The Employer's Case

The only objectionable conduct of the Union that appears to have had any evidence introduced at the instant hearing by the Employer' are statements and actions made by former employee Duane Miree. Specifically, the Employer maintains that Mr. Miree was an agent for the Petitioner and that he supposedly informed employees that if they voted "yes" they would not need to pay a union initiation fee. Petitioner would further request that objections 3-5 be dismissed for lack of any evidence presented at the hearing.

In the Employer's Objection and Election Brief, the Employer asserts that Mr. Miree was the only person used by the Petitioner in its organizing drive at the Employer. He was the liaison and mouthpiece for the Petitioner. Employer Virgo Medical Services, Inc.'s Brief in Support of Objections to Election, filed November 20, 2104 pg.4. The Employer presented three witnesses for its objection, Marlyn Williams, on-site coordinator, Desmond Brickle (dispatcher) and Rodney Arrington, the Employer's Philadelphia Operations Manager, NT-119.

There are two arguments the Employer is seeking to make against the Petitioner with its objections. One is that Duane Miree, a former employee, is an agent of the Petitioner. The second is the alleged unlawful statements of Mr. Miree about initiation's fee.[16] The Employer presented three witnesses Marlyn Williams, Desmond Brickle, and Rodney Arrington.

Marlyn Williams is the employed by the Employer as the onsite coordinator. She is stationed at the Philadelphia Veteran's Hospital [17]NT 57. She always works at this location. As noted above the main thrust of the Employer's argument as to Mr. Miree is an agent for the Petitioner is completely contradicted by Ms. Williams. On direct testimony, she acknowledged that while she observed Mr. Miree passing out voter authorization cards, she also testified she

[15] The parties agreed the Tensia Melton was not eligible to vote in the election. Petitioner counts the ballots of the three voters who did not sign the yellow envelope. Their failure to follow clear instructions should not be held against the Petitioner.

[16] These are Employer Objections 1 and 2. The Employer did not offer any testimony for Objections 3-5.

[17] Located at 3900 Woodland Avenue, Philadelphia, PA 19104

saw Ivan Kennedy and Ben Bass handing out cards, too. NT- 62. Clearly, Mr. Miree was not the only employee involved in the organizing drive. Ms. Williams, only testimony about the initiation fee waiver, is the following:

Mr. Warnock: Do you -- did you ever have a conversation with anyone about an initiation fee?

A. Yes, several different drivers. There was if you join now you'll save yourself a $200 lump sum of money and, you know, significantly higher union dues than drivers or other employees who joined the Union initially. NT-64.

Ms. Williams does not identify the person she had the conversation with. Ms. Williams also offered very limited testimony about the alleged heated discussions Mr. Miree had with Baron DeShong and Maurice Davis.[18] NT- 69 She also testified that she never saw Mr. Miree wearing a union jacket or wearing any union button. NT-70.

On cross-examination, it is quite clear that Ms. Williams did not support the Petitioner in its organizing drive. NT-72. She did not go to any of the meetings held by the Petitioner, nor did she read any mail she received from the Petitioner. When asked if Mr. Miree could have been misrepresenting facts about the Petitioner she responded he did that often NT 74.

Desmond Brickle

The Employer called Desmond Brickle, who is the day dispatcher for the Employer. He works at the 2038 East Hanes Street Facility. Mr. Brickle vaguely testified about the alleged waiver of the initiation fees.

Mr. Warnock: And when did you hear him make the comments about the $200 initiation fee -- waiving the $200 initiation fee?

A. That was at the end of June, early July because he was the one boasting about is there going to be a union here. So if you -- I'm going to put it to you like this, he said, "if you get down now, you ain't got to pay no fee." That was the exact words.

JUDGE GREEN: Oh, so what about all these other words?

THE WITNESS: I mean everything that I'm saying, that's exactly what he said. NT-105.

Mr. Brickle testified he never bothered to verify any of the statements that were made to him about the initiation fees by Mr. Miree.

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[18] Further, her testimony appears the only testimony that could arguably be used to support Objections 3-5. It has been recognized by the Board that representation elections are "heated affair[s]" and, consequently, an election will not be set aside "unless an atmosphere of fear and coercion rendered free choice impossible. "NLRB v. Herbert Halperin Distrib. Corp., 826 F.2d 287, 290 (4th Cir.1987).

Mr. Brainard: Did you ever bother to call and find out about what Mr. Miree was saying about the waiver of initiation fees or dues was correct or incorrect?

A. No.

Q Okay. You had no reason to, is that correct?

A I already had my mind made up. I wasn't joining. NT-107

The Board and courts recognize that in a hotly contested election "a certain measure of bad feeling and even hostile behavior is probably inevitable." Cal-West Periodicals, supra, 330 NLRB at 600 citing Nabisco, Inc. v. NLRB, 738 F.2d 955, 957 (8th Cir. 1984).

The last witness offered by the Employer on this matter is Rodney Arrington. He is the Employer's Philadelphia Operations Manager. NT 123. According to the Employer's counsel Mr. Arrington was offered to testify about "reliable hearsay" NT. 141. However, one aspect of Mr. Arrington's testimony that should be noted is that he contradicts the testimony of Mr. Brickle;

Mr. Warnock: Okay. And back to the question that I asked you a minute ago, did Brickle ever say anything to you about the $200?

A. Yes, Brickle had mentioned it, but it wasn't more – it was more of **what he heard. It wasn't that it was stated to him. It was that he heard the same thing**. NT 143

In sum, Mr. Arrington's testimony is nothing more than hearsay testimony about the alleged waiver of the union's initiation fee.

B. Union's Witnesses:

A. Duane Miree

Duane Miree testified that about the alleged statement he supposedly made about waiving the union's initiation fee. He testified that he never made such statements to the employees. He further testified that he was not the only employee that was involved in the organizing drive for the Petitioner.[19]

He testified that he was not a member of the Petitioner. The Petitioner did not pay him nor did he receive any special training in organizing from the Petitioner. In NLRB v. Halperin Distrib. Corp., 826 F.2d 287, 290-91 (4th Cir. 1987), the court held that "The Act... encourages a free-wheeling debate during the election process. Not [everyone] who supports the union or

[19] Employer notes in its Post Hearing Brief that Kareama Posey attended the R case proceedings on May 22, 2013.

who speaks in its favor is a Union agent." See also S. Lichtenberg & Co., 296 NLRB 1302 at fn. 4 (1989)

B. Robert Freiling

Robert Freiling testified that he is an officer of the Petitioner, and he was responsible for running the organizing drive at the Employer.[20] He testified about the initiation fees and dues: A:The response in regard to dues was the same for all organizing drives that Local 115 leads, in that we don't charge or ask for dues from employees until after we've secured a contract with their employer which they ratify. And then in regard to initiation fees, we waive the $200 initiation fee for any employee who is employed by the employer once we get a contract that is ratified with their employer, if they were employed as of the time of ratification and employees who are hired after that are subjected to the $200 initiation fee. NT 178

VI. Argument

A. There was no violation of the Savair Rule-No Dissemination

The Employer contends that the Petitioner acting through Duane Miree supposedly told employees; Marlyn Williams and Desmond Brickle that if they signed an authorization card for the Petitioner they would not have to pay an initiation fee. It should be noted first, there is no testimony in the record that either signed an authorization card or even supported the Petitioner. The Employer further argues that Mr. Miree was acting as an agent of the Petitioner (see argument above). The Employer will contend that Mr. Miree's conduct is objectionable under NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973) (union interfered with election by offering to waive initiation fees for those employees who signed authorization cards before the election).

Assuming arguendo, that Mr. Miree is an agent of the Union, the Employer's evidence fails to establish that his conduct could have affected the election results. There is no other credible evidence that Mr. Miree ever discussed the fee waiver with more than two employees who testified or that Miree's alleged statements were disseminated to other eligible voters. The Petitioner won the election by a wide margin (13-7, with 3 void ballots[21]).

The facts of this case and those cases that will be relied on by the Employer are distinguishable. In Savair, the Supreme Court concluded that a union's offer to waive initiation fees, limited to those employees who joined the union prior to the pending election, improperly

[20] S. Lichtenberg & Co., supra.
[21] The Employer does not contest the void ballots.

induced employees to sign cards authorizing the union to represent them and was likely to have interfered with employee free choice in two ways. First, the union was able to "buy endorsements" and thus "paint a false portrait of employee support during the election campaign," using this false showing of strength as a "persuasive campaign tool" in recruiting additional employee support. 414 U.S. at 277-78. Second, some employees might feel obligated, when they subsequently voted in the election, to "carry through on their stated intention to support the Union." Id.

The Supreme Court in Savair, itself emphasized that the election was decided by only one vote. 414 U.S. at 278 and 281. The Employer in the instant case has not presented evidence that there was any dissemination of this alleged Savair statement to any other eligible employees who voted in the election. There are no Board or court decisions holding that dissemination is irrelevant or may be presumed in cases involving a Savair violation. Erie National Brush & Manufacturing Corp., 340 NLRB 1386, (2003) at 1386. The Employer has failed to show there was any conduct by the Petitioner that interfered with the election.

B. Marlyn Williams and Desmond Brickle-No evidence that either signed an authorization card

In NLRB v. Savair Mfg. Co., id., the Supreme Court held that a union could not condition a waiver of the union initiation fee on an employee signing a union authorization card because such conduct "allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." Id. at 277. In the instant case, the testimony offered by the Employer that supports either Ms. Williams and Mr. Brickle signed an authorization is non-existent.

First, the Employer in its case did not clarify whether the alleged statement was made in connection with these two employees simultaneously signing authorization cards.

The testimony of Ms. Williams and Mr. Brickle as to what Mr. Miree allegedly said to them, does not even amount to a violation of the Savair rule. Further, even if this alleged conduct took place it does not require a new election because Ms. Williams and Mr. Brickle never signed an authorization cards. The Court in Savair had two primary concerns noted above at 414 U.S. at 277-78 as related to initiation fees waiver and authorization cards. Those concerns of the Supreme Court do not exist, in this case, because Ms. Williams and Mr. Brickle never signed authorization cards, their endorsements were not purchased, and there was no false

portrait painted that they supported the union. Nor did they feel obliged to vote for the Union. See Dyna-Fab, Corp., 270 NLRB 394 (1984) ("In the case where ... [a] waiver of initiation fees did not result in the execution of any authorization cards or membership applications, no endorsements were purchased and no false portrait of employee support could have been painted. Nor would any employees have felt morally impelled to vote for the [union] based on a benefit extended by the [u]nion in connection with signing a card or joining."). See also NLRB v. Standard Register Co. v NLRB, 233 Fed.Appx. 217 (CA 4th) 2007, enf. granted. the record is silent as to whether Mr. Miree or for that matter ever made any statements about the initiation fee waiver to any other employees who signed authorization cards with the inducement of the alleged initiation waiver. For these reasons, Employer's objections based on a violation of the Savair rule should be dismissed.

VII. Employer has not met its burden to Overturn the Results of the Election

The Board has held in Crown Bolt, Inc., 343 NLRB 776, 777 (2004), "[T]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees . . . [T]he burden of proof on parties seeking to have a Board-supervised election set aside is 'a heavy one." (Internal citations omitted); see also, Dairyland USA Corp., 347 NLRB 310, 313 (2006), enfd. sub nom. NLRB v. Food & Commercial Workers Local 348–S, 273 Fed. Appx. 40 (2d Cir. 2008) ("[A]n election will not lightly be set aside.").

In evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." Cedar Sinai Medical Center, 342 NLRB 596, 597 (2004), citing Cambridge Tool & Mfg. Co., 316 NLRB 716, 716 (1995). In deciding whether such interference has occurred under this standard, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of the persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) and the degree to which the misconduct can be attributed to the party. See, e.g., Cedar Sinai Medical Center, ibid;

15 Taylor Wharton Division, 336 NLRB 157, 158 (2001); Chicago Metallic Corp., 273 NLRB 1677, 1704 (1985), enfd. 794 F.2d 527 (9th Cir. 1986).

In this case, the Employer has clearly not met its burden with its Objections with regard to the Regional Director's direction of a mail ballot election or the objections to the conduct of the Petitioner for the reasons stated herein.

VIII. Conclusion

In the instant case, the Employer has sustained the heavy burden it has to have this election set aside. The Employer's objections to the Petitioner's conduct in this election should be dismissed as well as the Employer's Objection to the decision of the Regional Director to conduct a mail ballot election. The results of the election should be certified.

Respectfully submitted,

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Date: January 30, 2015

CERTIFICATION OF SERVICE

I, Norton H. Brainard, III do hereby certify that I have filed with Raymond P. Green, Administrative Law Judge, Dennis Walsh, Regional Director, Deena Kobell Counsel for the General Counsel and the Employer's counsels, a true and correct copy the foregoing Petitioner's Post Hearing Brief on the Employer's Objections in Case 04-RC-104485 a copy of Petitioner's Post Hearing Brief on the Employer's Objections has been filed pursuant to the requirements of Section 102.114(i) of the Board's Rules and Regulations on January 30, 2015.

Filed via Electronic Filing

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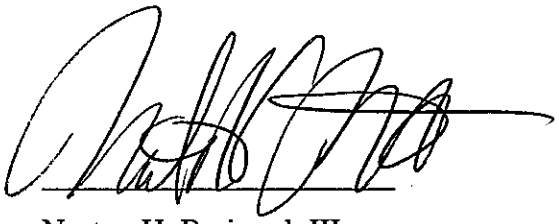

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Dated: January 30, 2015